No. 80-148

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IN THE SUPREME COURT

OF THE

UNITED STATES

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OCTOBER TERM, 1980

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JEFFREY RICHARD ROBBINS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

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ON WRIT OF CERTIORARI
to the Court of Appeal, State of California,
First Appellate District

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# PETITIONER'S REPLY BRIEF

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## I

## FACTUAL MATTERS

At page 6 of the Solicitor General's brief the United States takes the position that "nothing in petitioner's conduct signaled that he viewed these parcels as matter deserving of protection on a par with luggage." To the contrary, petition-

er's packages were securely wrapped and tape-secured parcels, which were placed in a closed luggage compartment along with other luggage. It would be hard to find a more incorrect statement than that of the Solicitor General.[1]

The Solicitor General (at p. 11 of the brief) cites United States v. Goshorn, 628 F.2d 697 (1st Cir. 1980) as a holding that paper bags and plastic wrapped bags are not protected by the Warrant Clause of the Fourth Amendment. In fact, that case held that the question depended upon the facts developed in the trial court with regard

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[1] It is urged by the Solicitor General that petitioner's alleged statement to the police, "What you are looking for is in the back," precludes a claim that he had subjective privacy expectations in the contents of the luggage compartment. Respondent, however, has already conceded that petitioner had subjective expectations of privacy in the contents of the securely wrapped packages. (Opposition to Petition for Writ of Certiorari, at 10.) The circumstances under which this involuntary statement was made are described at pages 5 and 6 of Petitioner's Brief and the statement has never been urged or relied on as a valid consent.

to the owner's treatment of such parcels and remanded for a new hearing to the District Court. On that new hearing, the District Court found that the plastic wrapped paper bags in that case were entitled to the protection of the warrant clause. See United States v. Goshorn, ___ F.Supp. ___, Crim. No. 79-215-N (March 6, 1981, USDC, Mass., Nelson, D.J.).

The Solicitor General makes a serious misstatement of fact in footnote 8, pp. 14-15 of his brief. He states that the officer "could feel" the contents of the package possessed by petitioner. What this package felt like is unknown on this record as no one asked the arresting officer whether he felt the packages before opening them and there is absolutely no testimony that he did feel them. The Solicitor General's conclusion that "parcels of this sort are generally unlikely to have very private contents" (brief,

footnote 8) is unsupported by the record. Petitioner's packages could just as well have been shoeboxes containing private papers, parcels wrapped for mailing which had not yet received a mailing label or any other private matters. Certainly there is no requirement in Ex Parte Jackson that a parcel be wrapped to make it apparent that is is destined for dispatch by mail as is argued by the Solicitor General, brief, footnote 9. In fact, Jackson holds that all parcels, wherever they may be found, are protected by the warrant clause and not just those dispatched by mail.

The Solicitor General does concede that sealing a package with tape could manifest the owner's special expectation of privacy in that package. Brief, p. 19. However, he then speculates that the tape in our case was used simply to form a container and prevent spillage. Once again, there is utterly no evidence of this in the re-

cord. So far as the record is concerned the packages were securely wrapped and taped.

The Attorney General speculates that the arresting officer "undoubtedly" would have noticed the pungent smell of marijuana from these packages. Brief, p. 61. There is no testimony that the packages had any smell whatsoever.

Since both the Attorney General and the Solicitor General refer to the probable cause which justifies the search in this case, petitioner should say that he does not concede probable cause for either the highway stop or the search of the rear of his vehicle. However, petitioner did not raise these issues in the Petition for Certiorari.

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II

THIS CASE DOES NOT INVOLVE A RETROACTIVITY PROBLEM BECAUSE THE LAW PETITIONER RELIES UPON WAS THE LAW AT THE DATE OF THE ILLEGAL SEARCH

Both the respondent and Solicitor General argue that petitioner is seeking to retroactively apply new law to his case to show that the search was unconstitutional under United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979). This is incorrect. The law petitioner is invoking was in effect at the time his securely wrapped packages were opened and searched without a warrant.

It is apparent from a reading of Chadwick that this Court applied the existing warrant requirement to defeat the three arguments the government made in that case, namely that the warrant requirement should only apply to searches in the home, that the locked footlocker should be treated in the same way as an automobile under the

principles of Carroll v. United States, 267 U.S. 132, and that the footlocker search was incident to the arrest. It was the government which tried to create new law in Chadwick, not the defendant. In rejecting the government's argument this Court stated:

> Moreover, in this area we do not write on a clean slate. [433 U.S. at 9.]

The slate had been occupied by many previous cases holding that absent specific narrow exceptions the Fourth Amendment requires that the judgment of the magistrate intervene between the police officer and the citizen before a search is accomplished. These cases extend at least as far back as Ex Parte Jackson (1878) 96 U.S. 727, 733. Of course, police are required to know and act in a manner consistent with the "core doctrine" of constitutional law.

Our point is reinforced when the lower court opinions in Chadwick are examined.

In the District Court (United States v. Chadwick, 393 F.Supp. 763) Judge Tauro in suppressing the seized evidence relied upon the rule of Katz v. United States, 389 U.S. 347 (1967), that warrantless searches are per se unreasonable and rejected the government arguments that the warrant requirement should not be applied. In the First Circuit (United States v. Chadwick, 532 F.2d 773) the government pressed the same arguments which it did in this Court and they were rejected with the court holding that the warrant requirement had been violated. Therefore, to argue that the Chadwick case in this Court established new law is to fly in the face of the history of that case as well as the history of the Fourth Amendment's warrant clause.

We would also like to point out several other factors which bear upon this argument. First, this Court in Sanders, supra, ap-

plied the Chadwick rule to the search in that case which took place before the Chadwick opinion was filed. It may be true that the State of Arkansas did not urge retroactivity in its briefs or argument before this Court, but it is also true that this Court applied the Chadwick rule to the search in Sanders without hesitation because the warrant requirement was not new law. What was new was the argument of the State of Arkansas that merely because a closed container was found within an automobile that the warrant requirement was not applicable. The rejection of that argument by this Court does not, of course, mean that the rule of law is created by this rejection. Indeed, Justice Powell for the Court found "no justification for the extension of [Carroll] and its progeny to the warrantless search of one's personal luggage merely because it was located in an auto-

mobile lawfully stopped by the police." (Sanders, supra, at 765, emphasis added.) Such has long been the established rule of this Court. See Chambers v. Maroney, 399 U.S. 42, 50 (1970, per Justice White); Coolidge v. New Hampshire, 403 U.S. 443, 479-481 (1971, per Justice Stewart); South Dakota v. Operman, 428 U.S. 364, 382 (1976, concurring opinion of Justice Powell); Cardwell v. Lewis, 417 U.S. 583, 591, 592, n. 8 (1974, per Justice Blackmun).

Second, in this very case this Court granted petitioner's previous petition for certiorari (Robbins v. California, No. 78-567) and vacated the judgment with directions that the case be remanded to the Court of Appeal for further consideration in the light of Arkansas v. Sanders. While it is true that Bowen v. United States, 422 U.S. 916 (1975) involved a similar procedural remand and a later holding that an intervening United States

Supreme Court decision was not retroactive, we think it unlikely that in our case this Court wished a retroactivity ruling in the light of the fact that Chadwick had just been applied retroactively in the very case for which a remand was made, Arkansas v. Sanders.

Thirdly, California is free to make its own decision on retroactivity of a Fourth Amendment interpretation regardless of the rule for federal courts. The court below did not even discuss retroactivity nor was it argued by the Attorney General. The court below proceeded to apply Arkansas v. Sanders. The California Supreme Court has also applied Arkansas v. Sanders and Chadwick v. United States retroactively. People v. Minjares, 24 C.3d 410, 421, n. 6, holding Chadwick did not accounce a new rule of law. This is an area where states should be free to make their own decisions regarding retroactivity, so long as there

is no conflict with a specific ruling of this Court that a particular Fourth Amendment interpretation is retroactive.

Lastly, both the respondent and the Solicitor General argue for a new constitutional rule which would be that there is no reasonable expectation of privacy in what they choose to term insubstantially wrapped packages and therefore the warrant requirement should not apply to such packages. If the issue of insubstantially wrapped packages is indeed a new constitutional issue (which we challenge) then the application of the law thus created is necessarily retroactive to the search involved in the case deciding that new issue. Stovall v. Denno, 388 U.S. 293.

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## III

## THE SUGGESTED NEW EXCEPTIONS TO THE WARRANT CLAUSE ARE NEITHER LAWFUL NOR PRACTICABLE

Neither the Attorney General of California nor the Solicitor General of the United States makes any attempt to defend the court below in deciding this case under footnote 13 of Sanders. We now examine the tests they suggest for adoption as constitutional principles.

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### A. Reply To The Attorney General

Respondent essentially argues that "petitioner's expectation of privacy in the containers searched was not so intense that a search warrant was required." (Brief for Respondent, p. 14, emphasis added.) In order to find the point on the gradient scale of intensity where a warrant is required, respondent creates the following novel test:

> If a reasonable person, in light of all of the circumstances, has cause to believe that the container in question is a repository of personal effects, then a warrantless search is prohibited. If, however, there is no reason to believe that the container is a receptacle for such articles, then probable cause alone is sufficient to justify the search. In evaluating all of the circumstances, the searching police officer may consider the intended purpose of the container, its present use, how it is secured or sealed, how it is stored, its outside markings, its weight and consistency, and any odor it may emit. [Citations omitted.] "Personal effects" comprises "such tangible property as is worn or carried about the person, or tangible property having some intimate relation to the person."
> (Brief for Respondent, pages 51-52.)

No court has ever articulated such a rule. The rule, indeed, is flatly contrary to Ex Parte Jackson, 96 U.S. 727, which protects "sealed packages . . . in the mail . . . as if they were retained by the parties" and packages "closed against in-

spection wherever they may be." Id. at 733 (emphasis added). Jackson extends the Warrant Clause to such packages irrespective of whether the package puts the world on notice that it contains clothing, "tangible property having some intimate relation to the person," or papers. For it is a rare package that travels in the hands of a public carrier that permits the observer to do any more than guess what is inside. And it is exactly because of their nondescript quality that such parcels are private. As this Court indicated in Arkansas v. Sanders, 442 U.S. 753, when the "contents of a package can be inferred from their outward appearance" the expectation of privacy is lessened. Id. at 764-765, n. 13. A package which discloses that its contents are jewelry, or money, or papers is less private than the packages in our case.

The proposed rule would appear to

protect only luggage, briefcases and other types of containers which put the world on notice that certain types of personal effects might be inside. But reasonable expectation of privacy extends far beyond such containers. Luggage is commonly used by someone who is traveling away from his home. But if someone is traveling across town, or not traveling at all, luggage would not commonly be used to store or carry personal effects. In such case, the person would be more likely to use a box, a bag, a tin, a briefcase, or some other similar container. Of these, respondent would apparently protect only the briefcase. But not everyone has a briefcase. Lawyers and certain types of middle level corporate executives have briefcases, but not the blue collar worker, the secretary, the housewife, the high school student, the waitress, or the auto mechanic. And even if a briefcase is possessed, it may

already be filled, or it may be too small to carry the private objects in question.

Respondent offers no reason for limiting Warrant Clause protection to only "such tangible property as is worn or carried about the person, or tangible property having some intimate relation to the person." (Brief for Respondent at 52.) Such a limitation would appear to place books, movies, photographs, tape recordings, gold, silver, and other property not worn on the body outside the protection of the Warrant Clause. Such property, however, is ordinarily much more private than the shirts, pants, hosiery, and razor kits which respondent wishes to protect.

Respondent's proposed rule would create an exception to the Warrant Clause large enough to exclude most of what the Warrant Clause is designed to protect. Yet the rule is that exceptions to the Warrant Requirement are "few" and "jealously guarded" and are limited to those cases where the

societal costs of obtaining a warrant, such as danger to law officers, or the risks of destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate. Jones v. United States, 357 U.S. 493, 499 (1958); United States v. United States District Court, 407 U.S. 297, 318 (1972). The exception proposed by respondent obviously does not satisfy these standards.

The proposed exception to the Warrant Clause is likewise so vague that it invites case by case evasion instead of analysis. It asks the policeman in the heat of ferreting out crime to feel a package, smell it, and presumably shake it to guess what is inside. After this examination, respondent would have the police decide whether a reasonable man would have cause to believe personal effects were inside, taking into account "the intended purpose of the container, its present use, how it is secured

or sealed, how it is stored, its outside markings, its weight and consistency, and any odor it may emit." (Brief for Respondent at 51-52.) But how does a container get an "intended purpose?" Whose intention? How does the police officer know its "present use" until the container is opened up? How does the method of securing or sealing indicate whether or not "property worn or carried about the person" is inside the parcel? How does "the method of storage" indicate whether "property . . . worn or carried about the person" is inside the parcel? How does the weight of a package "closed against inspection" indicate what is inside? How does the consistency of the container indicate what is inside? Just how relevant are outside markings? It is common knowledge that containers are re-used and that a shoebox does not always contain shoes.

The vague rules of this sensory guess-

ing game are shown by respondent's application of them in this case. For all anyone could tell, the nondescript packages in this case could have contained any number of personal effects. The packages presented the "visual impression of . . . package(s) that had been tightly wrapped for shipment by mail." (Dissenting Opinion, at A-10 and A-11, app., Petition For A Writ of Certiorari.) The storage of the packages in a secure luggage compartment along with luggage items notified the officers that the packages were the functional equivalent of luggage. The secure wrappings likewise put the officers on notice that personal effects might be inside. Yet respondent evaluates these facts and takes them to suggest that the container was not a repository of personal effects.[2]

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[2] Likewise, respondent urges that the appearance of a cookie tin does not cause one to believe that personal effects may be inside. But it is common knowledge that people sometimes employ cookie tins to store small personal items such as jewelry, letters and postcards. In any event, the cookie tin is not before this Court as its protection under Sanders was conceded in the court below.

Thus the rule urged by the Attorney General draws no clear line and creates an exception to the Warrant Clause large enough to exclude most of what the Warrant Clause is designed to protect.

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B. Reply To The Solicitor General

The Solicitor General proposes a different exception to the Warrant Clause for "searches of various kinds of bags and insecure parcels" (Brief for the United States as Amicus Curiae at 14). Nevertheless, the Solicitor General qualifies his exception by noting that even the search of such containers may require a warrant when "by reason of particular features, the appearance of a parcel, its surroundings, the conduct of the person claiming Fourth Amendment protection or other circumstances, an individual may so manifest his expectation of privacy in a container ordinarily em-

ployed for nonprivate use" that a warrant may be required. (Brief for the United States as Amicus Curiae, p. 15, n. 9.)

Whatever the merit of these contentions, they have no bearing in this case since it is undisputed that the parcels in this case were "securely wrapped." In their March 4, 1980 opinion, the California Court of Appeal found that the packages were "tape secured" (Petition For A Writ of Certiorari, No. 80-148, p. A-5.) Likewise, in their May 9, 1978 opinion, the Court of Appeal found that the packages were "securely wrapped." (Petition For A Writ of Certiorari, No. 78-567, p. iii.) The photograph in evidence shows a "package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes." (Dissenting Opinion, Petition For A Writ of Certiorari, No. 80-148, p. A-11.) But inasmuch as the Solicitor General raises the issue of a Warrant

Clause exception for searches of "various kinds of bags and insecure parcels," petitioner offers the following comments.

The Solicitor General's sole contention is that "insubstantial" containers ordinarily involve less expectations of privacy than substantial containers and that therefore a warrant should not be required. Their assumption that "insubstantial containers" involve lower expectations of privacy, however, is totally unproven. Consider the ordinary envelope. What less substantial container could there be? It is not a "personal sanctuary." It has little "structural integrity" and can be easily torn. Yet a person who carries a sealed envelope expects the privacy of its contents to remain inviolate. If he puts the envelope down on his desk, or on a car seat, he does not lose his right of privacy.

Even if the envelope is unsealed, the

expectations of privacy are substantial. As Justice Jackson questioned, "If it were wrong to open a sealed envelope . . . would it have been right if the mucilage failed to stick?" Harris v. United States, 331 U.S. 145, 197, 91 L.Ed. 1399, 67 S.Ct. 1098 (1947) (dissenting opinion).

The expectation of privacy which society should be prepared to recognize as "reasonable" or "legitimate"[3] should not

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[3] Both the respondent and the Solicitor General distort the "legitimate" expectation of privacy standard. This Court has given the following explanation of this standard:

> [A] "legitimate expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one that the law recognizes as "legitimate" . . . his expectation is not "one that society is prepared to recognize as 'reasonable'." Katz v. United States (1967) 389 U.S. 347, 361. (Harlan, J., concurring). Rakas v. Illinois (1978) 349 U.S. 128, 143-144, n. 12.

A burglar in someone else's cabin is hardly comparable to a driver of his own automobile with securely wrapped packages in his luggage compartment.

turn on the presence or absence of locks and seals. Locks and seals "have nothing to do with legitimate expectations of privacy where the police are concerned. We lock our things to keep out those disposed to violate the law, not those who enforce it." People v. Pace, 92 Cal.App.3d 199, 205 (1979).

Except for those who may view the streets of our society as an armed camp, any container which preserves the privacy of its contents creates a legitimate expectation that the privacy will not be violated. And even those who feel threatened in the streets would do well to employ a nondescript bag rather than a piece of luggage which invites curiosity about the value of its contents.

Essentially the Solicitor General asks this Court to override the presumption in favor of warrants and to produce a new exception to the Warrant Clause for so-called

"insubstantial containers." No such exception is required since the principles underlying the Warrant Clause already deal with such needs. Emergencies, material in plain view, consent and other waivers have been designed to and do protect societal needs.[4] The Solicitor General identifies no particular "societal needs" to justify the exception they propose.

Unfortunately, the Solicitor General does not apply his "insubstantial test" in a straightforward fashion. He urges that the packages in this case, which the California Court of Appeal found were "securely wrapped" (Opinion at iii, Petition For A Writ of Certiorari, No. 78-567) and "tape

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[4] If a container is actually so insubstantial that it is torn, the contents may be in plain view and the right to a warrant may be waived. But if the wrappings of a parcel are not torn, what are the "identified needs of society" which require the police to tear it open without a warrant? Or if a container in an automobile is litter, a paper cup or any other trivial container, it might be argued that privacy has been waived or that the police are not on notice of privacy interests.

secured" (Opinion at A-5, Petition For A Writ of Certiorari, No. 80-148), are "insecure parcels." Likewise, although the Solicitor General claims that the policeman should take into account the location of the package and the precautions taken to secrete it (Brief For The United States As Amicus Curiae at p. 15, n. 9), the Solicitor General ignores the fact that the packages in this case were located alongside luggage in a luggage compartment under the floor in the rear deck of a station wagon.

Given this type of application of their own test, one must ask what kind of line this test draws. How well hidden must a container be before the police are to be deemed to be on notice that the location is an indicia of privacy? How "substantial" must the package be to pass the test? How much "structural integrity" is enough? These questions led the en banc United

States Court of Appeals for the District of Columbia to reject the Solicitor General's test in an opinion, the reasoning of which we adopt. United States v. Ross, ___ F.2d ___ (March 31, 1981).

As Justice Cardozo articulated in another context, administrative discretion must not be "unconfined and vagrant. It [must be] canalized within banks that keep it from overflowing." Panama Refining Co. v. Ryan, 392 U.S. 388, 440 (1935) (dissenting opinion). Tests founded upon subjective evaluations of whether an expectation of privacy is so "intense" or a container is so "substantial" fail to create any banks at all.

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## IV

## CONCLUSION

The District of Columbia Circuit has rendered an important en banc decision in

United States v. Ross (No. 79-1624, March 31, 1981) which is a powerful protection for opaque packages lawfully seized by the police. While petitioner's packages were even more securely sealed and protected than the pouch and paper bag involved in Ross, and thus the full extent of the Ross decision need not be passed upon in this case, its discussion is enlightening.

Eight judges[5] agreed in Ross that a warrant is required for the opening of an opaque container lawfully seized by the police, absent emergency conditions. They pointed out that there is already such protection for "luggage" whether locked or unlocked and whether in public view or not. They held that a constitutional rule protecting "luggage" but not less expensive

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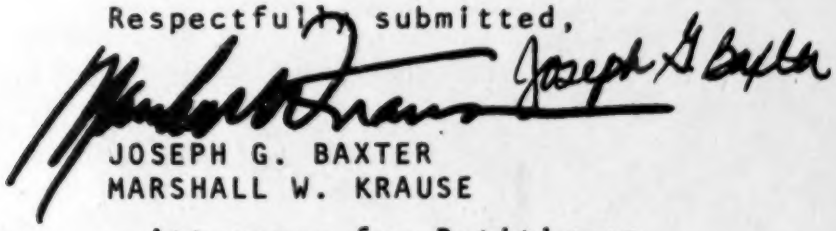
[5] Seven judges signed the majority opinion and Judge Wilkey agreed with it on the merits, dissenting on a retroactivity point. Three judges dissented on the point that a paper bag qualifies as "luggage."

containers would protect the wealthy, the well-advised and the fastidious at the expense of the general population and that a rule based upon durability of the container would impose an "unreasonable and unmanageable burden on police and courts." (Slip opinion, p. 4.) It held that the insubstantial container rule "would destroy the coherence of a well-established, clear, eminently manageable rule that, absent special necessity, a search must rest upon a search warrant." (Slip opinion, p. 22.)

For the reasons stated, the judgment below deprives petitioner and countless others of precious constitutional rights of security and privacy and must be reversed.

Dated: April 15, 1981

Respectfully submitted,



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PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over the age of 18 years, employed in the County of Marin, in which county the within mentioned mailing occurred, and not a party to the within mentioned cause. My business address is Wood Island, Suite 207, 60 E. Sir Francis Drake Blvd., Larkspur, CA 94939. On April 17, 1981 I served the within Petitioner's Reply Brief on the parties in said action by placing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Larkspur, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 17, 1981, at Larkspur, California.

